United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7363

ORIGINAL

To be argued by
SAMUEL N. GREENSPOON

United States Court of Appeals
FOR THE SECOND CIRCUIT

IN THE MATTER OF THE APPLICATION
of
ANTCO SHIPPING COMPANY, LIMITED,
Petitioner-Appellant,
against
SIDERMAR S.p.A.,
Respondent-Appellee.

For an order and Judgment pursuant to Article 75, CPLR staying a certain proposed arbitration.

IN THE MATTER OF THE ARBITRATION
between
SIDERMAR S.p.A.,
Cross-Petitioner-Appellee,
and
ANTCO SHIPPING COMPANY LIMITED and NEW ENGLAND PETROLEUM CORPORATION,
Cross-Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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SAMUEL N. GREENSPOON

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Preliminary

Sidermar's brief seems to be postulated on the notion that the exclusion of Israeli ports was because the parties had good reason to deem Israeli ports unsafe (br. p. 3) and in any event the exclusion in the contract was never enforced and thus did not have the effect of furthering or supporting Arab restrictive trade practices (br. p. 5).

Building on those postulates Sidermar says that the Export Administration Act ("Act") only deals with United States exports and only authorizes the issuance of implementing regulations that "may apply to the financing, transporting and other servicing of exports and the participation therein by any person" (br. pp. 5-6); and presumably therefore the boycott provision in the contract did not offend the Act.

We submit that Sidermar is wrong as to all those contentions.

I

The contract is a boycott of Israel and violative of law and public policy

The exclusionary clause reads as follows (17a)*:

"ARTICLE 4

"Loading One (1) or two (2) safe port(s) Mediterranean Sea, excluding Israel, or in case of necessity, at Charterer's option, (1) one or two (2) safe port(s) Nigeria. If two load ports used, such ports to be in rotation East/West. However if a mandatory situation should arise Owner to agree to a rotation out of this order with a mutually agreed compensation so as to keep Owner whole."

---

* Figures in parentheses refer to pages in joint appendix.

The only possible construction of that clause is that Israeli ports are excluded whether or not they are safe.

If the parties deemed Israeli ports unsafe or had reason to do so, there was still no necessity for inserting the words "excluding Isreal" (17a). The mere definition of loading areas as "safe port(s)", would have excluded Israle if its ports were unsafe.

To the contrary, during the war, Israel controlled the Eastern Mediterranean, both on land, sea and in the air, and if any ports were safe they were the Israeli ports.

To be noted is the fact that there is no exclusion of Egyptian ports or Syrian ports, or any ports of any Arab country. Certainly, both Egyptian and Syrian ports were less safe than Israeli ports, since as we all know the Israelis, as stated, controlled the sea and the air.

Accordingly, the only possible purpose for inserting the words "excluding Israel" was to conform to the Arab boycott of Israel and to preclude the ships from being required to call at Israeli ports. At least, if there were any question concerning the purpose of including the words "excluding Israel" the Court below should have given the appellants an opportunity to prove the purpose therefor.

The mere fact, if it be the fact, that the appellant, Antco, never requested Sidermar to load at an Israeli port is utterly irrelevant. After all, under the contract the appellant, Antco, was forbidden to demand that the ships load at Israel, and any such demand could have been rejected out of hand by Sidermar if that clause was enforceable. To say that a clause in a contract had no effect because neither party sought to demand performance in conflict with the clause, is to exalt form over substance. Sidermar necessarily knew when it included that provision excluding Israel in the contract that the appellant, Antco, would not seek performance in conflict with that exclusionary clause.

There is no claim made by Sidermar that any of its ships touched Israeli ports in conflict with the exclusionary clause. Palpably, any such claim would be facetious since the contract itself barred any touching of Israeli ports. Thus, the exclusion of Israeli ports necessarily had the effect of furthering or supporting certain restrictive trade practices of the Arab League.

The final contention of Sidermar, based on its erroneous postulates, is that under the Act the regulations could only "apply to the financing, transporting and other servicing of exports and the participation therein by any person."

That statement is palpably erroneous. The Act is clearly to the contrary. Indeed, the Court below made the same error when it quoted Section 4(b)(1) of the Act, 50 U.S.C. App. Sec. 2403(b)(1), which in effect authorizes regulations prohibiting or curtailing the exportation from the United States, its territories and possessions, of articles and other matters (61a).

Congress authorized the implementation of the Act in far broader terms than dealing only with United States exports. Thus, Section 4(b)(1) of the Act, 50 U.S.C. App. Sec. 2403(b)(1) expressly provides:

> "The rules and regulations shall implement the provisions of Section 3(5) of this Act [Section 2402(5) of this Appendix] . . ."

Section 3(5) of the Act, 50 U.S.C. App. Sec. 2402(5) reads as follows:—

> "2402. Congressional declaration of policy
>
> "The Congress makes the following declarations:
>
> "(5) It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other coun-

> tries friendly to the United States, (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States, and (C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies."

Thus, the President of the United States, or his designee, was directed, i.e. "shall implement", to implement the public policy laid down by Congress as stated above, to wit, to oppose restrictive trade p actices or boycotts fostered or imposed by foreign countries against countries friendly to the United States and to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

This mandatory requirement to implement Section 3(5) meant in plain language that the President or his designee was to issue regulations implementing the public policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States and that is precisely what the regulations did implement. Thus, Section 369.1 of the regulations, 15 C.F.R., Part 369, expressly provided:

> "§ 369.1 General Policy
>
> "Section 3(5) of the Export Administration Act of 1969, as amended, declares that it is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States.

"DISCRIMINATION ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

"(a) *Prohibition of Compliance with Requests*

"All exporters and related service organizations (including, but not limited to, banks, insurers, freight forwarders, and shipping companies) engaged or involved in the export or negotiations leading towards the export from the United States of commodities, services, or information, including technical data (whether directly or through distributors, dealers, or agents), are prohibited from taking any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting a restrictive trade practice fostered or imposed by foreign countries against other countries friendly to the United States, which practice discriminates, or has the effect of discriminating, against U.S. citizens or firms on the basis of race, color, religion, sex or national origin."

There is nothing inapplicable about Section 3(5) of the Act or Section 369.1 of the regulations. They are very clear. They lay down a public policy and a regulation implementing the same which bars the making of any contract which has the effect of furthering or supporting a restrictive trade practice or boycott fostered by the Arab League against Israel, a country friendly to the United States. And the contract at bar falls squarely within the prohibitions of the Act and of the regulations promulgated pursuant thereto.

Sidermar then argues that the public policy implicit in the Convention of 1958 overrides the foregoing "national" policy which it distinguishes from public policy on the basis of *Parsons & Whittemore Overseas Co., Inc.* v. *Societe Generale de L'Industrie du Papier (Rakta)*, 508 F. 2d 969 (2 Cir. 1974).

It is true that implicit in the Congressional acceptance of the Convention of 1958, there is a public policy in favor of enforcement of arbitral awards and perhaps even of contracts to arbitrate, although the *Parsons* case applied only to the enforcement of arbitral awards. But, the Convention expressly provides that a contract to arbitrate shall not be enforced if it is null and void, inoperative or incapable of being performed (Article II, Convention of 1958, 9 U.S.C. Sec. 201).

Obviously, it is the Courts of the contracting state, to wit, here, the United States, which must determine whether the contract to arbitrate is null and void, inoperative or incapable of being performed. In making that determination, certainly a United States Court is bound by the public policy of the United States and not by the public policy of some other country. That seems to be the plain meaning of *Hurd* v. *Hodge*, 334 U.S. 24, 34-5 (1948).

In the *Parsons* case, this Court ruled that the public policy defense relied upon to vitiate the arbitration award was a mere parochial device protective of national policy interests and did not reach the level of United States public policy. Apparently all that was involved therein were various actions by United States officials subsequent to the severance of American-Egyptian relations, most particularly the state department's withdrawal of financial support for the project involved in Egypt (p. 974 of 508 F. 2d).

As this Court ruled such actions may have been a sort of national policy protective of United States political interests but was not a declaration of United States public policy.

But the contrary is true here. Congress has expressly declared that it is the policy of the United States to oppose boycotts of friendly nations, such as Israel. That is not the sort of a national policy interest involved in the *Parsons* case, but is a flat declaration of United States public policy. To read the Congressional declaration of policy as a mere

parochial device protective of national political interests would be to undermine the very policy which Congress has mandated. And as the Supreme court noted, the public policy of this country is gleaned from statutes enacted by Congress. *Hurd* v. *Hodge*, 334 U.S. 24, 34-5 (1948).

Sidermar recognizes the vast distinction between a flat declaration of public policy by Congress as stated in the Act and the ephemeral national political interests involved in the *Parsons* case, because it seeks to argue that the policy of the United States involved in Parsons was embodied in statutes enacted by Congress, to wit, 22 U.S.C. Sec. 2370(p) and 22 U.S.C. Secs. 2370(q) and (t), (br. p. 17). But nothing in those statutes had anything to do with the policy at issue in *Parsons*.

The first of these statutes, 22 U.S.C. Sec. 2370(p) merely prohibited the United States from giving financial assistance to Egypt; but that had absolutely nothing to do with the contract involved therein. The policy laid down in that statute did not impinge in any way upon the contract involved in *Parsons*. To the contrary, the public policy laid down in the Act expressly prohibited the type of action contemplated by the contract at bar and the contract at bar was expressly prohibited by the regulations implementing Section 3(5) of the Act.

22 U.S.C. Sec. 2370(q), merely prevented the United States from furnishing assistance to any country which is in default for a period in excess of six calendar months in payment to the United States of principal or interest on any loan made to such country under Chapter 32, 22 U.S.C. Secs. 2151 et seq.

And 22 U.S.C. Sec. 2370(t) barred the furnishing of any assistance by the United States under Chapter 32 or any other Act or the making of sales under the Agriculture Trade, Development and Assistance Act of 1954, in or to any country which has severed diplomatic relations with

the United States. Again, that section had no application to the contract in *Parsons* and certainly did not in any way preclude the making or performance of the contract involved in *Parsons*.

All of the statutes cited by Sidermar as purporting to underlie the policy discussed in *Parsons* had nothing to do with private contracts or with the contract involved in *Parsons*. To the contrary, at bar, Section 3(5) and the implementing regulations expressly apply to the contract between the parties by declaring that the public policy of the United States will not tolerate contracts at odds with this nation's opposition to boycotts of countries friendly to the United States.

We respectfully submit that the public policy involved herein, mandated by Congress and the implementing regulations, is a true public policy and not some sort of a parochial device protective of an ephemeral national interest. Congress itself used the word "policy" in Section 3(5) of the Act, and it cannot be said that Congress used the word to merely declare some sort of an ephemeral national policy as opposed to public policy.

It may be that to strike down the contract at bar would have a serious impact on other contracts as Sidermar indicates (br. p. 18). That only aggravates the problem since the implication of Sidermar's statement is that there are innumerable shipping contracts which exclude Israeli ports. But the mere fact that there are such innumerable contracts mandates even more that the contract at bar be stricken down. This is so because a warning is necessary to all those who seek to make and enforce contracts in the United States that they will not be permitted to boycott any country friendly to the United States. The Court can thus strike a heavy blow at the Arab League boycott of Israel or at any other boycott of any other country friendly to the United States, by making

it crystal clear to all that such boycotts will not be tolerated.

The performance bargained for at bar was the loading of certain products at Mediterranean ports, excluding Israeli ports. That performance is contrary to the public policy of the United States, Section 3(5) of the Act and the regulations promulgated thereunder. The Courts should not in effect nullify the "excluding Israel" provision by reading it out of the contract as Sidermar seeks to do, or by saying that it really has no effect at all. Every word in the contract should be given its necessary meaning; and if Sidermar was not seeking to support the Arab League boycott of Israel then it should not have included the words "excluding Israel" in contract. It is now too late for Sidermar to say that these words should be given no effect and should be practically read out of the contract.

The argument that an arbitration clause is separable from the contract and thus may be valid even if the substantive provisions are illegal (br. p. 22) is not applicable here. To enforce the arbitration clause and thus leave it to the arbitrators to determine the question of public policy, would in effect require this Court to say that it will not pass on the question of whether the contract is null and void under the law of the United States. This is not to say that the arbitrators would not follow the law of the United States and apply its public policy. What we are saying is that this Court has the duty to enforce the United States public policy and to refuse enforcement of contracts which in any way violate that public policy.

All that *Robert Lawrence Co., Inc.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2 Cir. 1959) cert. dism. 364 U.S. 801 (1960) holds is that a claim of fraud in the inducement does not vitiate a contract to arbitrate as matter of law and that such question of fraud is for the arbitrators. If, of course, the fraud goes to the arbitration provision itself, then that raises an issue for the Courts to decide.

But we are not here dealing with fraud in the inducement of a contract. We are dealing here with a contract which is null and void because it contravenes the public policy of the United States. The Convention has left to the Courts of this country the determination of whether any contract before it is null and void, inoperable or incapable of performance and presumably the Convention means that such issue is to be determined by the law and public policy of the forum country.

II

Nepco as guarantor did not agree to arbitrate

We submit that *Compania Espanola de Petroleos S.A.* v. *Nereus Shipping, S.A.*, 527 F. 2d 966 (2 Cir. 1975), cert. den. —— U.S. ——, 49 L. Ed. 2d 387 (1976) is no authority that Nepco is required to arbitrate here. The critical difference between the guarantee in *Espanola* and the guarantee at bar is that in *Espanola* the guarantor agreed to "assume the rights and obligations of [charterer] on the same terms and conditions as contained in the Charter Party". Here there is no assumption of the rights and obligations of Antco by Nepco. That is the vital distinction as this Court made very clear in *Espanola* when it held that the guarantor was required to arbitrate because it had agreed to "assume the rights and obligations" of the charterer (pp. 973-4 of 527 F. 2d).

Of course the assumption of the rights and obligations of the principal by the guarantor was for all practical purposes a novation that there is no novation here. At bar, the guarantee is more like that which was involved in *Taiwan Navigation Co.* v. *Seven Seas Merchants Corp.*, 172 F. Supp. 721 (S.D.N.Y. 1951).

The assumption that the words "fulfill and perform" in the guarantee at bar are the same as to "assume" (br. p. 24)

is certainly wide of the mark. Indeed, in *Espanola* the guarantor not only agreed to perform but agreed to assume; at bar there is a mere agreement on the part of Nepco to fulfill and perform (which probably means the same thing) and not to assume.

Vigo Corp. (Marship Corp. of Monrovia), 26 N.Y. 2d 157 (1970) cert. den. 400 U.S. 819 (1970) did not involve a question of a guarantor's obligation to arbitrate a dispute between his principal and a third party. That case merely involved the exercise of discretion by the lower Court in ordering a consolidation of two separate arbitrations in which the issues were the same and in which all of the parties had agreed to arbitrate.

Conclusion

The order appealed from should be reversed, Antco's petition granted, and arbitration stayed, and Sidermar's cross-petition to compel consolidated arbitration denied.

Respectfully submitted,

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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANTCO SHIPPING
VS
SIDERMAN

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

AFRIM HASKAJ being duly sworn,

deposes and says that he is over the age of 21 years and resides at 1431 42nd st, BklynNY

That on the 9th day of November, 1976 at

he served the annexed aooekka t's reply brief upon

Burlington Underwood & Lord, One Battery Park plaza, NY, NY

in this action, by delivering to and leaving with said attorneys

three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 9th day of November, 1976

Afrim Haskaj

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977